83-42-I

THE STATE OF NEW HAMPSHIRE

THE ATTORNEY GENERAL
STATE HOUSE ANNEX
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CONCORD, NEW HAMPSHIRE 03301-6397

April 15, 1983

Mr. Benjamin C. Adams, Commissioner
Department of Employment Security
32 South Main Street
Concord, New Hampshire 03301

Dear Commissioner Adams:

In your memorandum of October 8, 1982 to Attorney General Smith, you asked for clarification of advice given in writing to Chairman Bruno by Deputy Attorney General Deborah J. Cooper, and provided by her to you and Chairman Bruno during a discussion concerning certain rules and practices adopted by the Appellate Division. Specifically, you asked:

1. Whether Rule 202.01(d) conflicts with RSA 282-A:64, (Supp. 1981), which governs the time in which an appeal must be filed;

2. Under what, if any, circumstances may an Appellate Division opinion be made public; and

3. Whether Rule 206.01 exceeds the Appellate Division's authority.

We have carefully considered the issues raised in your memorandum, in light of the discussions which you had with Deputy Attorney General Deborah J. Cooper, and our opinion, as more fully explained below, is as follows:

1. Rule 202.01(d) is in conflict with RSA 282-A:64 (Supp. 1981).

2. To the extent opinions rendered by the Appellate Division identify individual claimants or employers, they cannot be made public; however, if the identifying information is excised, the opinion may be released.

3. Rule 206.01, as written, exceeds the Appellate Division's authority under RSA 282-A:66,I (Supp. 1981).

Time for Filing an Appeal to the Appellate Division

RSA 282-A:64 (Supp. 1981) provides, in pertinent part, that an appeal from a decision of the Appeal Tribunal:

> "...must be filed with the appellate division within 15 days of the date of mailing of the commissioner's decision on a request for reopening and not otherwise."

Rule 202.01(d) provides as follows:

> "An appeal shall be mailed in a timely manner to the appellate division within fifteen days from the date of mailing of an unfavorable decision. The postmarked date constitutes the date of filing an appeal with the appellate division."

We have, in examining this issue, reviewed cases which construe similar filing provisions for appeals to Superior Court from Department rulings under predecessor statutes, specifically RSA 282:6-F and 282:5-G. The New Hampshire Supreme Court ruled in Hunter v. State, 107 N.H. 365, 366 (1966) that the date of receipt of an appeal petition in the Superior Court clerk's office, and not the date of its mailing, determined timeliness of filing of appeals of employer tax decisions under old RSA 282:6-F(4). Similarly, the Court ruled in Rafferty v. DES, 107 N.H. 387, 389 (1966), that the date of receipt controlled in benefit appeal cases filed under former RSA 282:5-G [then a 10-day deadline]. The Court reaffirmed Rafferty in Ayotte v. DES, 114 N.H. 147 (1974).

The Legislature must be presumed to have been aware of the judicial construction of RSA 282:6-F and 282:5-G when it adopted similar language in enacting RSA 282-A:64 (Supp.

1981). Moreover, your Department has, since the time of enactment of RSA 282-A:60 (Supp. 1981) (governing the filing of requests for reopening of Appeal Tribunal decisions), construed its similar language, and construed its predecessor statute, RSA 282:5-E(1), to require receipt of the papers in your office to perfect filing. Your own construction of the similar statutory language, in which the Legislature has not interfered, is to be accorded some weight. See Department of Revenue Administration v. PELRB, 117 N.H. 976, 977-8 (1977).

Our view, therefore, is that the Legislature intended receipt of an appeal petition in the office of the Appellate Division to effectuate "filing." As Rule 202.01(d) impermissibly modifies provisions of RSA 282-A:64 (Supp. 1981) by extending the filing deadline, it is invalid. See State v. Kimball, 118 N.H. 567, 568 (1978).

Confidentiality of Appellate Division Opinions

RSA 91-A, the "Right-to-Know" Law, which governs access to public records, generally allows public inspection of records in the custody of State agencies. There are certain categories of records which are exempt from disclosure, as set out in RSA 91-A:5, including:

> "...confidential, commercial, or financial [records and] personnel, medical, welfare, and other files whose disclosure would constitute invasion of privacy."

Prior to the enactment of the 1981 DES Sunset legislation, the Department had been exempted from the Right-to-Know Law. See 1981 Laws, c. 576:5 and Lodge v. Knowlton, 118 N.H. 574, 575 (1978). With the passage of the Sunset bill, RSA 91-A was made applicable to the Department, and exemptions additional to those set forth in RSA 91-A:5 were established for records of the Department. Specifically, RSA 91-A:6 (Supp. 1981) provides that the provisions of RSA 282:9(M) shall operate to guide construction of the Right-to-Know Law as it applies to the Department. Records exempt from disclosure under RSA 282:9(M), as well as "all records and data developed from RSA 282:9(M)," are therefore exempt from the provisions of RSA Chapter 91-A. RSA 282:9(M) was repealed by 1981 Laws c. 408:4, and is replaced by RSA 282-A:117 through 123 (Supp. 1981). See 1981

Laws c. 408:9. The specific provisions, in pertinent part, of RSA 282-A:117 through 123 (Supp. 1981) bearing upon this issue are as follows:

> RSA 282-A:118 (Supp. 1981) -- "Information... obtained from any individual, claimant, or employing unit pursuant to the administration of this chapter shall be held confidential and shall not be published or open to public inspection in any manner revealing the individual's or employing unit's identity...."
>
> RSA 282-A:118,I (Supp. 1981) -- "[A]n employing unit may inspect...records and reports which pertain to his separate account, and records and reports of claimants where the employing unit was the last employing unit or the employer whose separate account may be or has been charged with benefits paid to such claimant."
>
> RSA 282-:118,II (Supp. 1981) -- "[A] claimant may inspect records and reports of an individual or employing unit which are directly [related to his own benefit claims]."
>
> RSA 282-A:118,III (Supp. 1981) -- "[P]ublic employees in the performance of their public duties may inspect records and reports of an individual, an employing unit or a claimant where such information will aid in the performance of their public duties."
>
> RSA 282-A:123 (Supp. 1981) -- "No records of any type in any form whether copies, compilations or reproductions pertaining to any individual or employing unit obtained in the course of or growing out of the administration of this chapter, or oral testimony relative thereto, as to either a specific person or in general shall be available for use in any proceeding administrative or judicial; except that a necessary party to a proceeding directly and primarily concerned with workmen's compensation or an employer-employee relationship may by the use of valid judicial process obtain such

> records as directly relate to the necessary parties to the proceeding, and otherwise as is provided by this chapter.... No oral or written policy statements, opinions, advice, instructions or information of the department as to a specific person or in general shall be available for use in any proceeding, administrative or judicial through any means, and any process which attempts to obtain such shall be null and void. (Emphasis added.)

Based upon our examination of the several foregoing provisions, we conclude that records and information of any nature which may identify an individual claimant or employer are not subject to public disclosure. It is, therefore, our opinion that decisions of the Appellate Division, to the extent that they identify individual claimants or employers, cannot be made public. However, if the information identifying the claimant and employer is excised, the decisions could be released.

Reopening Appellate Division Decisions and Time of Issuance of Opinions

Appellate Division Rule 206.01 provides as follows:
Procedures for Filing, Form for Rehearing

> (a) A request for a reopening and review of the Division's prior decision shall be mailed to the Appellate Division within 15 days after the date of mailing of the decision.
>
> (b) Reopening will only be granted upon a showing of good cause.
>
> (c) To reopen a case, three members of the Division must favor reopening.
>
> (d) Filing for a reopening by the Appellate Division shall stay the time for appeal to the New Hampshire Supreme Court.

RSA 282-A:64 (Supp. 1981) controls jurisdiction of the Appellate Division. As you recall, we rendered an opinion on

June 24, 1982, at the request of Chairman Bruno, concerning jurisdiction of the Appellate Division, in which we advised that the Division's jurisdiction under RSA 282-A:64 (Supp. 1981) is solely to review decisions of the Appeal Tribunal. We also concluded that the sole avenue of appeal to the Division was through the filing of an appeal within 15 days of a decision by the Commissioner on a request for reopening of the Appeal Tribunal decision forming the basis of appeal.

We note first that, unlike the statutes governing the procedures of the Appeal Tribunal, there is no express statutory power vested in the Appellate Division to reopen its decisions. The Division must, within 15 days of oral argument, act affirmatively to reverse or modify an Appeal Tribunal decision, or to remand for further proceedings, or it must adopt and affirm the Appeal Tribunal decision. RSA 282-A:65 and 282-A:66,I (Supp. 1981). If it does not so act affirmatively, the appeal to the Division is dismissed by operation of the enabling statute itself.

Despite the lack of an express statutory provision authorizing the rehearing of a case in the Appellate Division, it is our opinion that such authority does exist. Thus, the Appellate Division could rehear or reconsider cases it has decided, and it could, as a result, amend, modify, and clarify opinions it has rendered. The Appellate Division, in the interests of judicial economy, should have an opportunity to correct errors if they exist. See, e.g., Petition of Gorham School Board, 121 N.H. 878, 880 (1981).

However, the Appellate Division's implicit power to rehear or reconsider a case once decided is limited by the terms of RSA 282-A:66,I (Supp. 1981), which imposes a 15-day deadline for issuance of a decision by the Division once it has heard a case. Accordingly, if the Division were not to issue an opinion within the 15 days established by the statute in a given case, the Division's jurisdiction would terminate, and it could take no further action. In short, the Appellate Division can rehear or reconsider only those cases in which it has acted in some affirmative manner, whether it is to affirm, reverse, modify, or remand an Appeal Tribunal decision under RSA 282-A:65 (Supp. 1981), provided that it does so within fifteen days of hearing the case.

This power does not, however, include the power to stay the time for an appeal to the Supreme Court. The statute which provides for judicial review, RSA 282-A:67 (Supp. 1981), is intended to expedite determination of unemployment compensation cases (whether benefit or tax cases) in the Court. Compare, Supreme Court Rules 7 and 10 and RSA 541:1 (30-day appeal limitation). Moreover, RSA 282-A:67 (Supp. 1981) is a statute conferring a specific type of jurisdiction upon the Supreme Court, in conformity with RSA 490:5. Absent express legislation conferring upon the Appellate Division the power to effect a stay of the deadline set down in RSA 282-A:67,I, the Division cannot stay the time for Supreme Court appeal.

I trust that we have satisfactorily addressed the points you have raised in your memorandum of October 8, 1982. Please do not hesitate to call upon us if you wish to discuss these matters further, or if any questions arise concerning our views.

Very truly yours,

James D. Cahill, III
Attorney

JDC/smg
cc: George Bruno, Esquire
Chairman, Appellate Division